From: Steven Rubenstein
To: Microsoft ATR
Date: 1/15/02 11:26am
Subject: Input for Tunney Act

I hereby do my "civic" (public interest) duty of putting on record my opinion, for Tunney Act consideration, of the proposed settlement in DOJ and "some states" vs. M$.

Fact: Federal Judge Stanley Sporkin was disconcerted with M$'s business behavior as he understood it.
Fact: M$ and DOJ persuaded an Appellate panel, including Judge Harry Edwards, to overrule Judge Sporkin.
Fact: Failure to resolve some of Judge Sporkin's concerns eventually resulted in a full scale, costly lawsuit.
Fact: Federal Judge T.P. Jackson became so disconcerted with M$'s business and courtroom behavior as to jeopardize his career.
Fact: Antitrust experts expected the D.C. Circuit, including Judge Edwards, to overturn the bulk of Judge Jackson's rulings.
Fact: The D.C. Circuit UPHELD the bulk of Judge Jackson's rulings.
Fact: The Supreme Court would not grant certiorari to M$.
Fact: The DOJ, now headed by John Ashcroft, not Attorney General when the case began, reached a proposed settlement with M$.
Fact: Before proposed settlement, DOJ publicly eliminated its strongest weapon: possible breaking up M$.
Fact: News reports stated the "states" were surprised when the DOJ settled and were told after the fact.
Fact: 9 of the states and D.C. would not accept the settlement, contenting it would not remedy M$'s violations as upheld by the D.C. Circuit.
Fact: News reports indicate antitrust experts largely feel the proposed settlement is easy on M$ and has loopholes.
Fact: Throughout the trial and settlement talks, M$ did not abate its campaign to make all things software its own -- even dictating hardware.

At least 9 Federal judges -- 2 at the District level, 7 at the Circuit level -- and 9 Federal justices have expressed agreement, overtly or implicitly, that M$ has repeatedly conducted illegal business practices under, at least, the Sherman Act. I, as a consumer, a scholar, a sometime software developer (without affiliation with any software company), and a concerned citizen, do not see how the proposed settlement remedies any of the findings against M$. Further, at least from the time of the D.C. Circuit panel's overruling of Judge Sporkin, M$'s subsequent actions have shown it not to be trustworthy. Further, the fact that the DOJ, under a new Attorney General, would, without notifying the states accept such a settlement, under such conditions, REEKS OF THE VERY KIND OF BACK ROOM DEALINGS THE TUNNEY ACT WAS DESIGNED TO AVERT.

The only possible good in allowing a such a software monopolist to exist, is that it is U.S. based, and, in the fashion of the Federal government's facilitating the RCA-led oligopoly of World War I, a U.S. based monopoly in theory can benefit national security, including by facilitating standardization. Even this argument fails with M$: its leviathan tactics have removed, in fact necessitated against, any need for it to assure software quality. The FBI recently got on M$'s case, for building software that is so easily penetrated and subverted. The damage M$ has done in quashing software innovation invites software developers worldwide to expose and capitalize on the inferiorities of its products. M$ Internet Information Server and M$ Outlook have become such wide standards as to become two of the, if not THE two, major carriers of viruses and worms in the world. Consequently, even the argument of allowing M$ to continue in its current fashion for national security falls short.

We know that being a monopoly is not illegal, but violating the Sherman, Clayton, or Robinson Act is. M$ continues to claim it has the right to innovate, when in fact almost every one of its products either has been bought -- starting with DOS itself -- or copied from a less-monied innovator -- Apple, Lotus, Netscape, RealMedia, Sun Microsystems, to name a few -- which M$ can do, because it has the operating system running on 95% of the world's desktops. Lack of innovation cannot be good for the consumer. Anyone who praises M$'s products is doing so without knowledge of what might exist if potential products weren't crushed before inception or fruition, because venture capitalists balk at investing in something they know will be thwarted and because software developers have less chance and possible reward from following through on ideas.

Neither can the consumer benefit monetarily by there being only one major software company. The free market concept implies competition determines price. M$, being a monopoly, can charge almost as it pleases. Recently corporate customers have become disturbed with M$'s coercive upgrade licensing policy. Though no competition remains to which prices can be compared, it is known that M$ has more surplus than any other corporation in the world -- even more than any pharmaceutical or energy company. M$ could lower prices on its operating systems and productivity software significantly and remain "the world's richest company." It lowers prices on products in markets it is trying to win -- browser and media player are two examples -- to the point of negative revenue on those products, because its vast surplus enables it to cross-subsidize.

Surely, inasmuch as the Tunney Act is constitutional, this is a case to invoke it. The D.C. Circuit and the Supreme Courts await the outcome.

Humbly submitted,

Steven Rubenstein
Murfreesboro, TN
615 896-7862